No. 2443.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

v.

THE SOUTHERN PACIFIC COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

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The United States of America, plaintiff in error. *v.* The Southern Pacific Company, defendant in error.	No. 2443.

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STATEMENT.

This suit was instituted by the Government to recover from the defendant penalties for 12 alleged violations of the Federal hours-of-service act.

The first six causes of action were disposed of by trial; the last six by the demurrer of the Government to the defendant's answer; and it is because of the action of the trial court in overruling this demurrer and entering judgment for the defendant that the Government sued out its writ of error.

These last six causes of action relate to certain employees of the defendant engaged in the operation of a train engaged in hauling interstate traffic

58418—14——1

between Tucson and Bowie, Ariz. The petition alleges that while so employed they were kept in continuous service 17 hours and 30 minutes. (Rec., 7–13.)

The defendant filed the following answer (Rec., pp. 21, 22) to these several causes of action:

> Defendant, for its answer herein to plaintiff's alleged causes of action Nos. 7, 8, 9, 10, 11, and 12, in its complaint herein contained, admits that during all the times mentioned therein it was a common carrier engaged in interstate commerce by railroad in the State of Arizona.
>
> Admits that the persons named in the above-numbered counts in plaintiff's complaint were at the time mentioned employees of the defendant company.
>
> Admits that said persons, constituting the crew of extra No. 2794, mentioned in plaintiff's complaint, were called to leave Tucson at 5.50 a. m., which would put them on duty at 5.20 a. m. of the date mentioned, and were each and all of them relieved at 10.50 p. m. of the same date.
>
> The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in plaintiff's complaint for the period of 1 hour and 30 minutes on account of and by reason of the said train breaking in two,

and that the said break in two and delay of 1 hour and 30 minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at —— a. m. on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents, or employees; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the 1 hour and 30 minutes' delay at Esmond as aforesaid.

Wherefore defendant prays that the delay of 1 hour and 30 minutes, by reason of the unavoidable accident as aforesaid, be allowed defendant, and that the provisions of this act shall not apply to this defendant in the alleged causes of action contained in counts 7, 8, 9, 10, 11, and 12 set forth in plaintiff's complaint, and that the defendant go hence without day, together with its costs.

To this answer the Government demurred (Rec., pp. 23, 24), assigning five grounds of demurrer, which are set forth in the assignments of error (Rec., pp. 34–37). While the answer was also demurrable on the ground that it was indefinite and uncertain as to the cause of the break in two, this was not relied upon in the lower court; therefore it will not be urged in this court.

ASSIGNMENTS OF ERROR.

1. The said District Court of the United States for the District of Arizona erred in overruling the demurrer of the United States of America to the answer of the said Southern Pacific Co. to the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in the petition or complaint herein for the reason that it does not appear from the said answer that the breaking in two of the train mentioned in said answer at Esmond and the delay thereto was not known to the said Southern Pacific Co. or its officer or agent in charge of the employees mentioned in said causes of action at the time they left a terminal.

2. The said District Court erred in overruling the said demurrer for the reason that it does not appear from said answer that the breaking in two of said train at Esmond prevented the said Southern Pacific Co. from relieving the employee mentioned in any of said causes of action before he had been continuously on duty more than 16 hours.

3. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the failure of the said Southern Pacific Co. to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours was due to a casualty or unavoidable accident or the act of God; or that the failure so to relieve such employee was the result of a cause not known to said Southern Pacific Co. or its officer or agent in charge of

such employee at the time he left a terminal and which could not have been foreseen.

4. The said District Court erred in overruling said demurrer for the reason that it does not appear from the said answer that the said Southern Pacific Co. made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours.

5. The said District Court erred in overruling said demurrer for the reason that the matters set forth therein as a defense to said causes of action are insufficient in law to constitute a defense to any of said causes of action.

6. The said District Court erred in rendering judgment in favor of said Southern Pacific Co. and against the said United States of America upon the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in said petition or complaint, for the reasons stated in the foregoing assignments of error.

QUESTIONS INVOLVED.

1. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit its employees thereon to continue the operation of such train to the end of their usual or customary run?
2. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely

showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours-of-service act?

3. Do the provisions of the hours-of-service act authorize a carrier to require its employees in train service to remain continuously on duty for 16 hours and for so much longer as they may possibly have been delayed en route by reason of some unavoidable accident?

4. Do the words "a terminal," as used in the proviso of section 3 of the hours-of-service act, mean—

(*a*) Only *the* terminal from which an employee in question starts on his trip? or

(*b*) *Any* terminal through which such employee may pass while en route to the end of his usual or customary run?

ARGUMENT.

I, II, III.

The mere delay to a train on account of some unavoidable accident will not license the carrier thereafter to disregard or ignore the mandatory provisions of section 2 of the hours-of-service act.

"The delay," as used in the proviso of section 3 of the hours-of-service act, does not refer to a delay that some particular train may have suffered, but has reference to the delay of the carrier in complying with the mandatory provisions of section 2 of the act.

The delay to a train of 1 hour and 30 minutes on account of an unavoidable accident does not, of itself, authorize the carrier to permit its employees thereon to remain continuously on duty 17 hours and 30 minutes.

As all the above questions are closely related, they will be considered under one general discussion of the limitations placed upon the mandatory provisions of section 2 of the act by the proviso of section 3.

Section 2 of the act provides:

> *That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved* and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * *

The italicized portion indicates that provision of the act the construction of which is involved in this case.

The only limitation placed upon these mandatory provisions of section 2 is to be found in the

proviso of section 3, upon which the carrier relies as an excuse or justification for its failure to relieve certain employees after 16 hours' continuous service.

This proviso reads as follows:

> That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that "whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours *he shall be relieved*" unless the failure of the carrier so to relieve him is due to one of the causes named in the proviso.

It seems to be the theory of the carrier that whenever a train is delayed somewhere on its run by an unavoidable accident the employees thereon are automatically removed from within the provisions of the act for a period of 16 hours plus the time lost by reason of such unavoidable detention. In other words, the carrier contends that the proviso should be so construed as to mean that an unavoidable delay to a train operates as a license to prolong the hours of service of its employees thereon beyond the period prescribed by Congress.

So to hold would be merely to limit the phrase "*in any casualty*" to its narrow *interpretation* and justify a carrier in requiring service of its employees in excess of 16 hours, *even in those cases where such employees could be very easily relieved before being on duty longer than the statutory period.*

"*The provisions of this act shall not apply in any case of casualty,* * * *" should be *construed* to mean that a carrier will be excused for requiring excess service of its trainmen *and for its failure to relieve them after they have been on duty 16 hours* only in those cases where a casualty or the like actually prevents a compliance with the mandatory provisions of section 2.

It was said in *United States* v. *Farenholt* (206 U. S., 226): "It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent;" and in *Williams* v. *Gaylord* (186 U. S., 157) the court said: "The very essence of construction is the extension of the meaning of a statute beyond its letter."

To illustrate the defendant's *interpretation* and the Government's *construction* of the act:

A train leaves W destined for Z, the run of which ordinarily consumes 15 hours and 30 minutes. At X, about 1 mile from W, it is delayed 1 hour and 30 minutes on account of an unavoidale accident. Before the cause of this unavoidable detention has

been removed the carrier knows that the employees so delayed, if permitted to operate their train to Z, will be on duty approximately 17 hours. But in spite of this knowledge, in spite of the fact that such employees could be relieved before being on duty over 16 hours, they are required to operate their train to Z, having been in continuous service 17 hours.

The Government contends that such excess service is not licensed by the unavoidable delay to the train after leaving W; that an unavoidable accident has but the effect of relieving the carrier from the penalty only in those instances where such accident has a direct, or causal, connection with the failure of the carrier to relieve the employees at the expiration of 16 hours.

The theory of the carrier is that because "the provisions of this act shall not apply in any case of * * * unavoidable accident" it is not required to make the slightest effort to prevent excess service on the part of its employees.

On the assumption that such a construction of the act is the proper one, the fact is lost sight of that one of "the provisions of this act" is the mandatory requirement that an employee "shall be relieved" after 16 hours' continuous service.

We do not believe there is anything in the act, either expressed or implied, that could in any manner be construed to bear out the contentions of the carrier in the present case. It is a departure even from a literal reading of the proviso; and in spirit

and intent it is but an ingenious effort to evade the requirements of the statute.

The absurdity of the carrier's construction can be no better illustrated than by the following:

A train is en route from W to Z, which ordinarily consumes about 14 hours. No unavoidable accidents are encountered before reaching X, a station midway between W and Z, but on account of heavy traffic it does not reach X until the crew have been on duty 10 hours. It is known for some time that they can not reach Z and be relieved within 16 hours; therefore, in order to comply with the mandatory provisions of section 2, arrangements are made to relieve the crew at Y, at which point it is calculated they will arrive approximately within 16 hours from the time they went on duty at W. But after leaving X the train is delayed one hour by some unavoidable accident, and the efforts theretofore made to relieve the crew at Y are abandoned, for, as the carrier will contend, it is under no legal obligations to relieve the employees "*in any case of casualty or unavoidable accident.*"

The above clearly presents a situation that might be warranted by a literal interpretation of the proviso. While the pleadings in the instant case ask credit only for the time lost by reason of an unavoidable accident, this, we believe, is a greater departure from a literal reading of that proviso than would be a construction of the same authorizing 24 hours' continuous service following an unavoidable delay of 2 or 3 hours.

In considering what "provisions of this act shall not apply in any case of casualty or unavoidable accident" we must either eliminate or fully consider that provision requiring that an employee "*shall be relieved*" after 16 hours' continuous service. But can we eliminate that provision from our consideration without holding that "the provisions of this act" should be construed to mean only "*some of the* provisions of this act"? If so, then we are confronted with the question of what provisions shall not apply in cases of unavoidable accidents. So, if we consider that mandatory provision, if it is to have any weight in arriving at a construction that will carry out the intent of Congress, do we strain a point in saying that in order to excuse a carrier its failure to relieve an employee after he has performed the statutory period of service must be the result of an unavoidable accident or the like?

In the case now under consideration the train was delayed by an unavoidable accident, which undoubtedly jeopardized the lives of its crew; but instead of thereafter providing relief, which for all we know might have been done, the carrier required the same crew to continue on duty for 17 hours and 30 minutes—1 hour and 30 minutes in excess of the period fixed by Congress beyond which a trainman could not work with safety to himself and to those depending upon his alertness and vigilance for protection.

If we carry the contention of the carrier to its logical conclusions, it means that under no circumstances is it required to prevent excess service on the part of passenger and certain other crews having regular scheduled runs. If such a train is not delayed by reason of some unavoidable accident there will be *no necessity* of providing a relief crew, but in the event that it does encounter an unavoidable delay there is *no legal obligation* to prevent excess service of the crew.

Looking at it in another way; the contention of the carrier is that because it could not prevent the unavoidable delay to a certain train it was not required to make any effort to prevent excess service of its crew. *In other words, because it could not prevent its employees thereon being endangered once it was not required to provide relief and thus remove the cause of future hazard, not only to those same employees but to employees and passengers of other trains.*

> This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its *purposes* may be effected. (*United States* v. *Kansas City Southern Railway Company,* 8th C. C. A.; 202 Fed. Rep., 828, and cases cited.)

This liberality of construction applies to that section of the act defining or creating the offense, but is of no avail to the carrier in its attempt to bring itself within the proviso. As was said by Mr. Justice Story in *United States* v. *Dickson* (15 Pet., 141, 165; 16 L. Ed., 689):

> The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The answer does not disclose the least casual connection between the break in two of the train and the service required of the crew. In fact, taken most strongly against the pleader, the answer shows nothing more than wanton neglect in permitting the crew to remain on duty over 16 hours. Had the so-called unavoidable accident prevented the carrier from relieving the crew before they had been continuously on duty more than 16 hours it should have been pleaded; and if such accident actually necessitated the employment of this crew for the full period of 17 hours and 30 minutes, such fact should also have been pleaded. But for

all we know, the unavoidable accident might have occurred immediately after leaving the initial terminal, in which event the carrier had sufficient time to provide relief and prevent excess service of the crew. Having pleaded that such unavoidable accident was unknown to the carrier "at the time said train and employees left Tuscon, *the terminal,*" has it thereby set up facts sufficient to bring itself clearly within the proviso? In order properly to plead its affirmative defense, the carrier must show, not merely the delay to a train by reason of some unavoidable accident, but it must also show that *all of the service* required of the crew so delayed was necessitated by such accident, and that the same was unknown to the carrier at the time the employees in question left *"a terminal."*

A carrier should not be excused for wholly disregarding the mandatory provisions of the act with respect to certain employees, even though their train may have been delayed by an accident clearly unavoidable. There may be times when a carrier, by reason of some unavoidable accident, is prevented from relieving an employee before he has been on duty a little over 16 hours, but we do not believe that such excusable failure to prevent some excess service is any justification for the failure of the carrier thereafter to make some efforts to reduce to a minimum such excess service. To illustrate our meaning:

A train is en route from W to Z. When leaving Y the crew have been in continuous service nine

hours, but shortly thereafter are delayed seven hours by some unavoidable accident, the place of delay being where no relief can immediately be furnished. The crew remain on duty, assisting in removing the cause of the delay, but by the time this is done they have been in continuous service 16 hours. From the scene of the accident the train proceeds to Z, a run of approximately six hours. Long before the wreck was cleared the officials knew that this train could not reach Z within 16 hours from the time it left W, but in spite of this knowledge the crew are required to operate their train to Z, their period of service being 22 hours.

Now, this train was delayed by an accident clearly unavoidable, preventing the carrier from relieving the employees thereon before they have been in continuous service 16 hours, although it could have relieved them before they were on duty 17 hours. But the carrier attempts to justify its neglect to prevent 22 hours' service by its inability to prevent either the unavoidable accident or 17 hours' service of the crew thereby delayed. This illustration clearly portrays the attitude of the carrier in the instant case, even if we assume that the break-in-two pleaded as an excuse had the least causal connection with some of the excess service of the employees in question.

We believe that "*whenever any such employee* * * * *shall have been continuously on duty for 16 hours he shall be relieved* * * *" unless the

failure to relieve him before he has finished his trip is due to an unavoidable accident or the like, and not due to the carrier's negligence in failing to take even ordinary precautions to provide relief, particularly when it is apparent that in the absence of such the employee in question will be on duty over 16 hours.

It may be argued that it would be a hardship on the carrier to be required to take such precautions to provide relief and thus give to its employees and travelers that protection which we believe the law demands. This argument is a dangerous one and should not be heeded. The question of hardship is a dual one. There may be instances where the sending out of a relief crew might possibly be a hardship on the carrier from a financial point of view; but if we consider this phase of the question we must of necessity and reason consider the question of hardship from the point of view of those employees and travelers whose lives would be jeopardized by some act of omission or commission on the part of some trainman who is both mentally and physically impaired by being in continuous service over 16 hours.

In the case now under consideration the unavoidable delay to the train did not prevent the carrier's obedience to the mandatory provisions of section 2; at least, it was not so pleaded. Therefore, we may assume there was not the least causal connection between such unavoidable accident and

the failure of the carrier to relieve its employees before they had been continuously on duty 17 hours and 30 minutes.

In this connection we desire to call attention to the reasoning of the court in the case of *Newport News & Mississippi Valley Co.* v. *United States* (61 Fed. Rep., 488). Lurton, then circuit judge, in delivering the opinion of the court, said:

> The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.
>
> This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.
>
> It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or miti-

> gated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could, by due care, have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an avoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *
>
> An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause, the unlawful confinement and unreasonable detention but an effect of that negligence.

This last case involved violations of the 28-hour law, in which the carrier is only required to exercise ordinary care in its efforts to comply with the provisions of that act; but under the hours of service act it should not be excused for exercising only ordinary care. The carrier should be held at least to a high, if not the highest, degree of care, and only the exercise of such care in its endeavor to relieve an employee before he has been on duty over 16 hours should excuse such excess service.

The fact that a carrier exercised the required care to prevent an accident delaying a train does not relieve it from thereafter exercising some care to avoid the consequences of such unavoidable delay. But under no circumstances do we believe that an *excusable* delay to a train is a license for an *inexcusable* delay in relieving the employees thereon after 16 hours' continuous service.

This so-called "license" phase of the proviso was considered in a case against the Southern Railway Co., western district of North Carolina, decided October 30, 1913 (not yet reported). In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and for so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. On this phase of the question the trial court said:

> On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to

> 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States* v. *Oregon-Washington Railroad & Navigation Company* (No. 5943), district of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of said delays and not otherwise the defendant required said employees to remain on duty 1 hour and 15 minutes in excess of 16 hours, and but for said delays said employees would not have remained on duty any amount of time in excess of 16 hours and would have completed the trip from La Grande to Umatilla in much less than 16 hours' continuous run." The answer also alleged that the causes of the delay were not known to the carrier or its officer or agent in charge of said employees at the time such em-

ployees left " the La Grande terminus " (the initial terminal for that crew).

To this answer the Government demurred and assigned the following grounds of demurrer:

> 1. It does not appear from said answer that the causes of the alleged delays between La Grande and Umatilla were not known to the defendant or its officer or agent in charge of the employee named in each cause of action of plaintiff's petition at the time he left a terminal.
>
> 2. It does not appear from said answer that the alleged delays between La Grande and Umatilla prevented defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.
>
> 3. It does not appear from said answer that the failure of defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty or unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.
>
> 4. It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

In sustaining the Government's demurrer the following remarks of District Judge Bean are pertinent:

> In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than sixteen consecutive hours, unless it shall be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen.
>
> So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than sixteen hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railway company's train is delayed and the sixteen hours expire, it is the duty of the company to relieve its employees if it can do so by sidetracking its train, if there is a station where it can be done, and that it cannot use the delay as a part of the time necessary to reach one of its terminals; otherwise it might continue the service for an indefinite length of time. So I take it this answer is not sufficient, and the demurrer should be sustained.

In the case of *United States* v. *Baltimore & Ohio Railroad Company,* No. 1710, Southern District of Ohio, decided December 17, 1913, the same question

was raised. In his charge to the jury District Judge Sater said:

> The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the 16-hour period. Do I state your position correctly?
>
> Mr. DURBAN. Yes, your honor, except that we claim that the statute by its terms says that in that case the act shall not apply.
>
> Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.
>
> The COURT. That is the position of the defense as their interpretation of the law.
>
> The Government takes a different view. Its view is that even though a delay excusable in law has occurred, after it is over and the train proceeds the carrier is not excused from working the men or permitting them to work beyond the 16-hour period, or further beyond the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more of service if they should complete the whole trip. If they remained on duty to the end of the trip, they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question decided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred, the crew may go forward operating the train, but that it can not be held in service without violat-

> ing the law (if the 16-hour period has expired), if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

It will be urged that these views of the several courts, including that of the trial court in the case at bar, are not in harmony with, but antagonistic to, certain administrative rulings of the Interstate Commerce Commission; but we believe that a glance at these rulings will be sufficient to convince to the contrary.

On March 16, 1908, the Commission made the following ruling:

> 287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.

The " occurrences " that " could not be guarded against " by the exercise of the proper precaution on the part of the carrier include those instances where an unavoidable accident is the direct cause

of an employee being on duty over 16 hours, and also where, after he has been on duty 16 hours, there is no "lack of precaution on the part of the carrier" in thereafter providing relief.

In conformity with the Commission's view, that, in order to prevent excessive hours of service, the carrier would send out a relief crew, unless prevented by some unavoidable accident or the like, in which event the crew so delayed might proceed to the end of its run, the operation of its train being in charge of the relief crew, the Commission, on May 5, 1908, made the following ruling:

> 74. Hours-of-service law. Employees deadheading on passenger trains or freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty," as that phrase is used in the act regulating the hours of labor.

The law should not be so harshly construed as to compel a carrier at the exact minute the 16-hour period expires immediately to stop a train at whatever point it may happen to be and probably block its main line until the crew has had 10 hours' rest or until a relief crew arrives. Nor has the Commission, either in its construction or administration of the law, endeavored to place such a hardship on the carrier. But having in mind possible instances where crews can not be relieved after being delayed by reason of unavoidable accidents, regardless of

the precautions thereafter taken by the carrier to provide relief, the Commission made the following administrative ruling:

> May 25, 1908. Ruling 88.
>
> (*b*) Section 3 of the law provides that—
>
> "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."
>
> Any employee *so delayed* may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See rule 287.) (Italics ours.)

It follows, therefore, that under these rulings an employee may be permitted to operate his train to the end of the run in those instances where he is delayed by "such occurrences as could not be guarded against" and when through "no neglect or lack of precaution on the part of the carrier" he can not be relieved.

Bearing in mind the purpose of the law, together with the fact that "every overworked man presents a distinct danger" (*M., K. & T.* v. *U. S.*, 231 U. S., 112), it is not an unreasonable construction of the same to hold that whenever an employee in train service has been continuously on duty for 16 hours he shall be relieved, not merely from that particular kind of service, but from any kind of

work, unless the carrier's failure to relieve such employee is due to one of the causes set forth in the proviso. We do not believe it is sufficient for the carrier merely to say that a train was delayed by some unavoidable accident, without showing the length of the delay or the connection between such delay and the failure to relieve the employee at the expiration of 16 hours.

It is respectfully submitted that any unavoidable accident is not, standing alone, a license to a carrier to disregard that provision of section 2 providing that an employee *shall be relieved* after 16 hours of continuous service.

The carrier will, of course, contend that the words "so delayed" refer, not to the delay in relieving an employee after he has been on duty 16 hours, but have reference to *any delay* his train may have encountered by reason of some unforeseen cause after leaving the initial terminal; and therefore unforeseen delays to a train will license any *preventable* or *inexcusable* delay in relieving the employees thereon.

As the words "so delayed" have direct reference to the word "delay," as used in the proviso, which has already been fully discussed, we do not believe it necessary to discuss any further the carrier's ingenious construction of the hours-of-service act and the rulings of the Interstate Commerce Commission.

In support of its contention that all its acts, avoidable and inexcusable, are pardoned and con-

doned when committed subsequent to an unavoidable accident, reference may be made by the carrier to the case of *United States* v. *Atchison, Topeka & Santa Fe Railway Co.* (212 Fed. Rep., 1000). But we can not entirely reconcile this case with such contention.

In the first part of the decision in the Santa Fe case, much stress is laid upon the construction of the proviso taken in connection with the administrative rulings of the Commission. At the bottom of page 1006, we find this sentence:

> In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employee *knew,* or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point.

In other words, if we may judge by the above, the carrier would only be liable for those deliberate and willful acts of its officers and agents; and, therefore, any unforeseen delay to a train automatically removes the employees thereon from within the provisions of the law. But if this is the correct construction of the act, why the necessity of placing reliance upon the Commission's rulings? And having placed reliance upon such rulings, why lose sight of the fact that the "instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers?"

However, later in the decision (p. 1008), we find this construction of the act somewhat modified. The train there involved was delayed by an accident which was admitted to have been unavoidable and unforeseen at the time the employees thereon left their terminal. If we apply the construction of the act as expressed on page 1006 to this train crew, their case would be taken out of the statute and they might operate their train to the end of their usual or customary run. But in this instance, such unavoidable and unforeseen delay does not remove the case from within the statute, for the reason that part of the time consumed in reaching the final terminal was due to hauling a car manifestly in violation of the safety-appliance act.

We have no fault to find with this view of the court; in fact, we are heartily in accord with it. But we believe that if the negligence of the carrier in hauling a car in a manner prohibited by the safety-appliance act does not take the case out of the operation of the hours-of-service act, then negligence in another form, to wit, negligence in making no effort to relieve an employee at the end of 16 hours' service, should not remove that case from within the provisions of the act.

The criticism we have of this decision is the same we have of the carrier's contention—that "the delay," as used in the proviso, does not refer to the delay which some particular train may encounter, and, therefore, excuse excess service of the employees thereon; for it must be remembered that

one of the provisions of the act which does not apply in any case of casualty, etc., is the provision that " whenever any such employee * * * shall have been continuously on duty for 16 hours he shall be relieved." While we have the greatest respect for the court rendering the decision in this Santa Fe case, we can neither agree with it nor with the carrier in the instant case that it is unnecessary to show any causal connection between a delay to a train on account of one of the causes enumerated in the proviso and " the delay " of the carrier in relieving the employees " so delayed " after they have been continuously on duty 16 hours.

IV, V.

"A terminal," as used in the proviso of section 3 of the hours-of-service act, does not mean, with reference to a certain employee, only THE terminal from which he starts on his trip; it includes both the initial terminal and ANY OTHER terminal that such employee may arrive at and leave while en route to his final terminal, or end of his usual or customary run.

In the Fifty-ninth Congress, first session, April 26, 1906, Mr. Esch introduced H. R. bill 18671, which was referred to the Committee on Interstate and Foreign Commerce. The committee reported the bill back to the House on May 31, 1906, with certain amendments.

The original proviso in section 4 read as follows:

> *Provided,* That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occuring after such employee

has left *a terminal,* he is prevented from reaching *his terminal* within the time specified in section one of this act.

The committee recommended certain amendments, so that the proviso would read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left *a terminal,* he is prevented from reaching *his terminal* within the time specified in section one of this act.

On May 4, 1906, at the same session of Congress, Mr. Esch introduced H. R. bill 18961, which was also referred to the Committee on Interstate and Foreign Commerce.

That bill made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal.*"

On February 20, 1906, Mr. Bede introduced H. R. bill 25757, which made it unlawful to permit an employee to remain on duty more than 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching *his terminal.*"

On March 15, 1906, Mr. La Follette introduced Senate bill No. 5133, which is the present hours-of-

service act. This bill gave to the Interstate Commerce Commission full power to prescribe the hours of service of employees connected with train movements. It was referred to the Committee on Education and Labor, and reported by Mr. Dolliver, with an amendment, which fixed the hours of service instead of leaving it to the commission, and which made it unlawful to require service of an employee beyond 16 consecutive hours, " except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal.*"

On June 27, 1906, this bill was taken up for consideration and Senator Gallinger proposed a certain amendment, which made the proviso read as follows:

> except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agent in charge of such employee at the time he left *the terminal,*

to which amendment Senator La Follette proposed to add the following:

> or by unknown casualty occurring before he started on his trip.

Senator Foraker proposed an amendment, which if adopted would have made the proviso read as follows:

> except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his* terminal.

On January 8, 1907, Senator Dolliver offered an amendment to Senate bill 5133, which eliminated entirely the proviso and made the provisions of the act absolute.

On the same day Senator Gallinger proposed to add the following section to this bill:

> SEC. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed, in the ordinary course of business of the carrier, within sixteen hours.

On January 9, 1907, Senator Brandegee proposed an amendment making it unlawful for a carrier to require more than 16 consecutive hours' service of an employee, "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching *his terminal* * * *."

On the same day Senator Scott proposed the following amendment:

> This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach *a terminal: Provided,* That at the expiration of sixteen hours he is within twenty miles of such terminal.

On January 10, 1907, Senator McCumber offered the following amendment to follow the word "terminal" in the proposed Gallinger amendment of June 27:

> or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.

Senate bill 5133, as it passed the Senate on January 10, 1907, made it unlawful "to require or permit any employee engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than 16 consecutive hours, *except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.*"

After passing the Senate, this bill, on January 11, 1907, was referred to the Interstate and Foreign Commerce Committee of the House, and on February 16, 1907, was reported, with an amendment, and referred to the House Calendar. The proviso then read as follows:

> *Provided,* That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor

> where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left *a terminal,* and which could not have been foreseen with the exercise of ordinary prudence. (All italics ours.)

The conference committee, in its report on March 1, 1907, agreed upon several amendments, but left undisturbed and adopted the House amendment striking out the words, "his terminal."

At no time thereafter was the slightest effort made practically to stultify the act by permitting an employee, in cases of unavoidable accidents, to operate his train to the end of his usual or customary run, or, in other words, "his terminal."

CONCLUSION.

From the record in this case it clearly appears:

That the carrier (defendant in error) required certain employees in train service to be and remain continuously on duty more than 16 hours.

That while the carrier relied upon an unavoidable accident as a legal excuse for such service, it did not connect such accident with its failure to relieve the employees before they had been in continuous service more than 16 hours.

That the alleged unavoidable accident was known to the carrier and its officers and agents in charge of such employees at the time they left "a terminal."

Wherefore it is respectfully submitted that the judgment of the lower court should be set aside and the case remanded with instructions to sustain the Government's demurrer to the answer of the carrier to causes of action 7 to 12, inclusive.

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